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ABSTRACT

This chapter discusses the legal issues of schools' responsibilities concerning child abuse and neglect. Most state statutes make reporting mandatory for professionals, including school personnel, who have contact with children and who possess the requisite knowledge that raises a reasonable suspicion of abuse or neglect. Reporting must be done immediately. Most reporting laws are silent regarding civil liability for failure to report, but tort liability was established by the 1976 "Landeros v. Flood" case in California concerning a physician's failure to detect and report battered child syndrome. Inservice training can improve the ability of educators to detect abuse and can increase knowledge about reporting laws. School districts could be liable for failure to provide inservice training, as prosecution for child abuse accelerates. Educators learn of abuse through physical or verbal evidence, and they must attempt to preserve evidence and increase the probability that a child's verbal statements will be legally admissible. Hearsay evidence is excluded unless it constitutes an exception; most frequently used is the so-called excited utterance exception. Nondirective questioning of a victim is important to use. Educators and their attorneys are in a position to take affirmative steps to ensure that abused children are protected. (CJH)

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Responding to Child Abuse: Critical Issues for Educators and Their Counsel

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As many as one million American children are physically abused or neglected each year.[1] The number victimized by sexual abuse may be as high as 500,000.[2] The majority of these youngsters are of school age,[3] and the depressingly large number of abused and neglected children attending school raises serious and pressing questions for teachers, administrators, and school boards. Do the schools have a duty to detect abuse and neglect? When the problem surfaces, what should be done in response? What liability issues lurk beneath the schools' response or lack thereof? And finally, what techniques can be employed by educators to aid law enforcement and child protection officials in their efforts to curb child maltreatment? In an effort to shed light on these difficult questions, this chapter begins by defining the terms physical and sexual abuse and neglect. Then, it outlines the statutory duty of educators to report abuse and neglect to appropriate authorities. This is followed by discussion of liability for failure to take appropriate action. Finally, the last section discusses crucial evidentiary issues in child abuse litigation and techniques which can be employed in the schools to ensure that valuable evidence is not lost. Child abuse and neglect cannot be ignored, and the schools have a vital role to play in the social response to this serious and destructive social problem.

EA 018 741

1. American Humane Association, Trends in Child Abuse and Neglect: A National Perspective 13 (1984) [hereinafter cited as National Perspective]. The foregoing report indicates that 12% of reported cases of child abuse and neglect are reported by schools.

2. It is extremely difficult to determine the incidence of sexual abuse. The abusive adult is careful to preserve secrecy, and in most cases there are no physical injuries requiring medical attention. For general information on incidence of sexual abuse see National Center on Child Abuse and Neglect, Child Sex Abuse: Incest, Assault and Sexual Exploitation 2 (1981) (estimating more than 100,000 cases of sexual abuse annually); Schultz, *The Child Sex Victim: Social, Psychological and Legal Perspectives*, 52 Child Welfare 147, 148 (1973) (estimating as many as 500,000 cases per year); Russell, *The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children*, 7 Abuse and Neglect 133 (1983).

3. *See* National Perspective, *supra* note 1, at 22.

Defining Abuse and Neglect

States vary considerably in defining child abuse and neglect. Some statutes are phrased in expansive language which permits intervention in a broad range of circumstances, while others are narrowly tailored to discourage unwarranted governmental intrusion in family affairs.[4] While the nuances defy neat categorization, it is possible to cull certain common features from the statutes.[5]

- Physical abuse is usually defined as physical harm, or the imminent threat thereof, inflicted by non-accidental means. The abuser must act or fail to act with a specified mental state such as intent or culpable, criminal, or gross negligence.
- Sexual abuse is usually defined with reference to criminal statutes prohibiting specific acts such as incest, sexual molestation, unlawful sexual intercourse, sodomy, and rape.
- Neglect is a broad term embracing such things as abandonment, failure to provide basic necessities, lack of proper parental care or control, and exposure to depravity. The concept of neglect usually includes an element of parental fault or culpable negligence.
- Psychological abuse or neglect encompasses intentional or negligently inflicted psychological injury. Some states define this form of maltreatment in broad terms, while others define it narrowly in an effort to avoid inappropriate intervention in family privacy. One of the basic distinctions between the "broad" and "narrow" states is that jurisdictions following the former view permit intervention to prevent *threatened* psychological harm, while states adhering to the latter philosophy permit intervention only when a child is *actually suffering* psychiatric symptoms.[6]
- Medical neglect describes parental failure to provide a child with necessary medical care. When treatment is needed to save a child's life, courts uniformly approve state imposed medical care administered over parental objection.[7] When parents refuse to provide medical care that is needed by a child but which is not necessary to preserve the child's life, court decisions split. Depending on the facts of individual cases, courts sometimes authorize medical care over parental objection in non-life threatening situations.[8]

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4. There is currently a lively debate among those interested in the authority of the state to intervene in the family to prevent abuse and neglect. Numerous commentators take the position that state authority must be narrowly confined so as to deter unwarranted intervention into family privacy. *See* J. Goldstein, A. Freud & A. Solnit, Before the Best Interests of the Child (1979); Institute of Judicial Administration, American Bar Association, Juvenile Justice Standards – Abuse and Neglect (1980).

5. *See generally*, Katz, Howe & McGrath, *Child Neglect Laws in America*, 9 Fam. L. Q. 1 (1975).

6. There is substantial disagreement concerning whether the state should be authorized to intervene in the family to prevent psychological neglect or abuse.

7. Custody of a Minor, 379 N.E. 2d 1053, 1062 (1978). *See generally*, Myers, *Abuse and Neglect of the Unborn: Can the State Intervene?*, 23 Duquesne L. Rev. 1, 32-52 (1984).

8. *In re* Sampson, 317 N.Y.S. 2d 641 (N.Y. Fam. Ct. 1970), *aff'd*, 323 N.Y.S. 2d 253 (N.Y. App. Term 1971), *aff'd*, 328 N.Y.S. 2d 686 (1972); *In re* Jensen, 633 P. 2d 1302 (Or. Ct. App. 1981).

• Dependency is a term occasionally employed in child abuse and neglect statutes to describe cases in which a child's needs are not met, but in which the parents are not at fault. Examples include situations where parents are mentally or physically incapacitated and unable to care for their children, and circumstances in which parental poverty precludes the ability to provide basic necessities.[9]

Child Abuse Reporting Statutes

In 1962 the Children's Division of the American Humane Association conducted one of the first studies to determine the incidence of child abuse. The investigation relied on newspaper reports because at that time states did not require reporting of child abuse and neglect. The study disclosed "[s]ix hundred and sixty-two cases of child abuse . . . in 48 states and the District of Columbia."[10] It was also in 1962 that Dr. C. Henry Kempe and his colleagues published their seminal article describing the battered child syndrome.[11] The work of Dr. Kempe and others fueled the growing concern about the hidden problem of child abuse, and, beginning with California in 1963, states quickly responded by enacting statutes requiring professionals to report known or suspected child abuse and neglect to law enforcement or social services workers. By 1982 the number of reported cases rose to nearly one million.[12] The reporting laws brought the staggering pervasiveness of child maltreatment clearly into focus and generated unprecedented efforts to deal with the problem.

The details of child abuse reporting laws vary from state to state, although most jurisdictions follow a statutory scheme quite similar to the one outlined in this section. The statutes make reporting mandatory for a list of professionals who have contact with children and who

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9. Critics of state intervention to prevent child abuse and neglect point out that intervention is usually carried out against the poor. The charge is made that such intervention is discriminatory. *See* Wald, *State Intervention on Behalf of Neglected Children: A Search for Realistic Standards*, 27 Stanford L. Rev. 985 (1975). Scientific research reveals, however, that abuse and neglect occur most frequently among the poorest of the poor. *See* The Social Context of Child Abuse and Neglect (L. Pelton ed. 1981). The fact that many abusive parents are poor, and that poor parents are more likely to come to the attention of child welfare officials, cannot curtail the state's authority to intervene when children are abused or neglected. Policy makers, including educators, must find ways to help families lift themselves out of poverty. But while they do so, the state must retain its authority to protect endangered children.

10. National Perspective, *supra* note 1, at 7.

11. Kempe, Silverman, Steele, Droegemueller & Silver, *The Battered Child Syndrome*, 181 A.M.A.J. 17 (1962).

12. National Perspective, *supra* note 1, at 13.

13. When the child abuse reporting statutes were first enacted, the physician was often the only professional required to report suspected abuse or neglect. As legislatures amended reporting statutes, they added other professionals to the list of mandated reporters. In most states today, the reporting statutes take a laundry list approach; listing a wide array of professionals who come into contact with children. *See* Note, *Unequal and Inadequate Protection Under the Law: State Child Abuse Statutes*, 50 George Washington L. Rev. 243, 256-59 (1982) [hereinafter cited as Note, *State Child Abuse Statutes*].

acquire information which puts them on notice that a child may be abused or neglected.[13] *Nearly all states expressly name teachers and other school personnel among those required to report suspected abuse or neglect.*[14]

The reporting requirement is triggered when a person required to report, often called a "mandated reporter," possesses the prescribed degree of knowledge about a particular child. The terms used to describe the requisite level of knowledge vary from state to state, with commonly employed language including "cause to believe," "reasonable cause to believe," "known or suspected abuse," and "observation or examination which discloses evidence of abuse." Despite the differences in terminology, the basic thrust of the reporting statutes is the same—to require reporting by individuals possessing knowledge that a child may be suffering from abuse or neglect. It is important to point out that the individual need not "know" that a child is abused or neglected. All that is required is factual knowledge which raises a reasonable suspicion of maltreatment.[15] If a mandated reporter failed to report until he or she knew to a certainty that abuse or neglect occurred, the reporting statute would likely be violated. The decision about whether abuse has actually occurred is left to investigating officials, not to individuals required to report.

The variation in statutory language triggering the reporting requirement raises questions about whether the requisite degree of knowledge is measured by an objective or a subjective standard. In other words, is the subjective knowledge of the reporter the decisive factor or is the reporting responsibility triggered by an objective, "reasonable person" standard? The answer may have an important impact on liability for failure to report. Unfortunately, there is a dearth of case law interpreting the reporting statutes, and it is unclear how courts will construe particular statutory language. Statutes which use words such as "rea-

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14. A review of the reporting statutes discloses that nearly all jurisdictions list educators among those required to report suspected abuse. Oklahoma may be an exception to the general rule. The reporting statute in that jurisdiction appears to be limted to medical professionals. *See* Okla. Stat. Ann. § 846 (West 1983). In a small number of states the statutes state that "any person" with the level of knowledge needed to trigger the reporting requirement must report. *See, e.g.*, Utah Code Ann. § 78-3b-3 (1985 Pocket Part). *See also*, Oregon, Rhode Island, Tennessee, Texas and Wyoming.

15. *See* Fraser, *A Glance at the Past, A Gaze at the Present, A Glimpse at the Future: A Critical Analysis of the Development of Child Abuse Reporting Statutes*, 54 Chicago-Kent L. Rev. 641,659-60 (1977-78) [hereinafter cited as Fraser]. The reporting requirement is triggered by something less than probable cause as that term is employed elsewhere in the law. The case of Roman v. Appleby, 558 F. Supp. 449, 459 (E.D. Pa. 1983) is instructive on this point. The litigation was a 1983 action against a school counselor who reported suspected neglect to child protective service authorities. The child's parents argued, unsuccessfully, that the report invaded their constitutionally protected rights. The court interpreted the Pennsylvania reporting statute, and remarked that "[T]he Child Protective Services Law does not require that the individual making a report 'have probable cause' to believe a child is 'deprived.' A lesser quantum of evidence is sufficient, i.e., a person must have 'reason to believe . . . that a child coming before them . . . is an abused child.'"

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sonable cause to believe" probably denote an objective standard, while words such as "know" and "suspect" may be interpreted to require proof of subjective knowledge. The objective standard is viewed as the better argument, and adoption of such a standard makes proof of statutory violation reasonably possible and encourages maximum reporting — the *sine qua non* of the reporting statutes.

Starting from the position that educators are among the professionals required to report suspected child abuse, how sophisticated must the teacher or administrator be regarding the signs and symptoms of abuse and neglect? Certainly the law does not require educators to have the level of knowledge possessed by physicians, nurses, and child protective services workers. One commentator suggests that "a teacher would be required to report a suspected incident of child abuse only where a reasonably prudent schoolteacher would have reported."[16] In other words, the level of knowledge is tailored to the professional involved. However, the fact that most educators have little or no medical training should not lead school districts to conclude that it is unnecessary to provide in-service training on the recognition and assessment of abuse and neglect. Quite the contrary is true. The relative lack of pertinent knowledge among educators actually strengthens the case for such training. Raising the level of sophistication is the best way to protect children from harm and the school district and its employees from liability.

When a person required to report abuse gains factual information about a child which is sufficient to trigger the reporting statute, the law requires the individual to make the required report *immediately*. The statutes brook no delay. The reason for this urgency is, of course, to enable appropriate officials to take prompt steps to protect children from further abuse. Most statutes call for an immediate oral report to be followed within a short period of time by a written report. The reporting statutes in effect in most jurisdictions permit the individual to file the report with law enforcement officials or with the social services agency charged with responsibility for protecting abused and neglected children. The initial report usually consists of basic factual information about the child and the alleged abuse.

In most states the reporting statutes impose the reporting responsibility directly on the professional who learns of suspected abuse.[17] He or she is required to report to appropriate officials without delay. In some states, however, mandated reporters working under supervision are required or permitted to report suspected abuse to their supervisor, who, in turn, is required to notify appropriate law enforcement or child

16. Note, *Civil Liability for Teachers' Negligent Failure to Report Suspected Child Abuse*, 28 Wayne L. Rev. 183, 195 n.73 (1981) [hereinafter cited as Note, *Civil Liability for Teachers*].

17. The statutes usually state that when a mandated professional has the requisite degree of knowledge of abuse or neglect, he or she must report immediately to the appropriate law enforcement or child protection authorities.

protection officials.[18] School administrators and their counsel should consult local law to determine whether teachers are required to report suspected abuse directly, or whether the law permits procedures under which reports are made to supervisory personnel such as principals. In order to avoid confusion and reduce the potential for liability, school districts are well served when they formulate written procedures to be followed by all employees who are required to report suspected child abuse.

It is important for educators to realize that the reporting statutes do not permit the exercise of discretion concerning whether or not to report. *If the requisite triggering knowledge is present, the report must be made.* Educators, like other mandated reporters, sometimes feel that a report is unwarranted or that reporting suspected abuse or neglect will do more harm than good. Teachers or administrators may believe that the best course is to delay reporting in order to see whether the problem persists or whether it was an isolated incident. Educators may feel that they can deal effectively with the problem within the school system, and that bringing the police or social work professions into the picture will only complicate the situation and cause unnecessary disruption of the child's life. Finally, professionals may hesitate to report because they fear involvement in the legal system, because they believe they may be sued or disciplined, or because they believe reporting child abuse is not the proper role of educators. Whatever the reasons, some of which may be legitimate in individual cases, the law is clear that when mandated reporters possess the requisite level of knowledge, they *must* report. There are no exceptions, regardless of how logical or compelling the reasons may be. The statutory duty to report is satisfied only when the required report is made.

In order to protect confidential communication between individuals and certain professionals, the law erects privileges which can be invoked to prevent disclosure of confidential information. Examples include the physician-patient, psychotherapist-client, attorney-client, and husband-wife privileges. In the context of child abuse, a growing majority of states have amended their statutes so as to abrogate some or all of the traditional privileges.[19] Under these amendments, professionals are required to report suspected child abuse despite the fact that they

18. *See, e.g.*, Ark. Stat. Ann. § 42-807; Cal. Penal Code § 11165; Idaho Code § 16-1601; Kan. Stat Ann. § 38-1501; Main Rev. Stat. Ann. tit. 22, § 4001; Md. Code Ann. § 5-901; Mass. Gen. Laws Ann. ch. 119, § 51A; Ohio Rev. Code Ann. § 2151.01; 11 Pa. Stat. Ann. § 2201; Va. Code § 63-1-248.1; W. Va. Code § 49-6A-1; Wyo. Stat. § 14-3-201.

If a school district implements a procedure under which teachers report to a supervisor such as a principal, it becomes necessary to determine whether the state reporting statute permits a mandated reporter to, in effect, delegate the reporting responsibility to someone else. Will the teacher remain liable if the principal fails to report and the child is further abused? This difficult question must be answered before implementing a procedure in a particular educational setting.

19. *See* Fraser, *supra* note 15, at 664-65; Note, *State Child Abuse Statutes, supra* note 13, at 266-67; Comment, *Duties in Conflict: Must Psychotherapists Report Child Abuse Inflicted by Clients and Confided in Therapy?*, 22 San Diego L. Rev. 645 (1985).

learned of the abuse through confidential communications. The abrogation of privileges for confidential communications extends to school psychologists and other school employees who would normally fall within a privilege.

Liability

Civil Liability for Failure to Report

Most child abuse reporting laws are silent regarding civil liability for failure to report abuse, although a few statutes expressly state that civil liability attaches when failure to report is the proximate cause of further abuse.[20] The potential for tort liability based on failure to detect maltreatment or failure to report suspected abuse is a genuine concern in the school setting, where there is sometimes resistance to the reporting requirement.

Tort liability for failure to report child abuse was first addressed in the landmark case of *Landeros v. Flood*,[21] decided by the California Supreme Court in 1976. The case involved a medical malpractice action against Dr. Flood and his hospital employer. The plaintiff child sued through her guardian for injuries suffered at the hands of her mother and her mother's boyfriend. The complaint alleged that the doctor, who was working in the hospital emergency room, failed to diagnose the fact that the child was suffering from the battered child syndrome[22] and failed to report her condition to proper authorities. Because the doctor failed to detect and report the abuse, the child was returned to her mother, where she was further abused. On a subsequent visit to a different emergency room, the attending physician immediately diagnosed battered child syndrome and reported the case to the authorities. The child's suit alleged that Dr. Flood's negligent failure to diagnose and report her abuse was the proximate cause of the subsequent injuries.

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20. *See* statutes in Arkansas, Colorado, Minnesota (civil liability for false report), Montana, New York, and Rhode Island (liability for interference with a report).

21. 551 P. 2d 389 (Cal. 1976).

22. The battered child syndrome was originally described by Kempe and his colleagues in 1962 as follows:

> The battered child syndrome may occur at any age, but, in general the affected children are younger than 3 years. In some instances the clinical manifestations are limited to those resulting from a single episode of trauma, but more often the child's general health is below par, and he shows evidence of neglect including poor skin hygiene, multiple soft tissue injuries, and malnutrition. One often obtains a history of previous episodes suggestive of parental neglect or trauma. A marked discrepancy between clinical findings and historical data as supplied by the parents is a major diagnostic feature of the battered-child syndrome.... Subdural hematoma, with or without fracture of the skull is... an extremely frequent finding even in the absence of fractures of the long bones.... The characteristic distribution of these multiple fractures and the observation that the lesions are in different stages of healing are of additional value in making the diagnosis.

Kempe, *supra* note 11, at 17.

The *Landeros v. Flood* court held that the failure to detect and report child abuse can give rise to a cause of action based on the "[a]lternative theories of common law negligence and statutory liability...."[23] While *Landeros* involved a physician, the identical theories can be employed against educators.[24] School personnel, like other mandated reporters, may be found liable on the basis of common law negligence. The elements of the negligence cause of action are described in *Prosser and Keeton on Torts*[25] as follows:

> 1. A duty, or obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks.
> 2. A failure on the person's part to conform to the standard required: a breach of the duty ....
> 3. A reasonably close causal connection between the conduct and the resulting injury. This is what is commonly known as "legal cause," or "proximate cause," and which includes the notion of cause in fact.
> 4. Actual loss or damage resulting to the interests of another ....[26]

In the context of child abuse reporting, the second and fourth elements of the negligence cause of action – breach of duty and damage – pose few problems for potential plaintiffs. The first and third elements, however, are somewhat problematic. Do educators owe a tort duty to students which is violated by failure to report? While the answer may vary from state to state, it is suggested that the great majority of courts would find a legal duty on the part of educators to protect abused and neglected children. The special relationship between educators and students has been held to impose an obligation on the former to safeguard the latter, and the inability of children to protect themselves supports the case for imposition of a duty to fulfill the statutory reporting obligation.[27]

The third element of the negligence cause of action requires a finding that the defendant's conduct was the proximate or legal cause of the

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23. 551 P. 2d at 396.

24. In *Landeros v. Flood* the California Supreme Court stated in dicta that the liability imposed on physicians for failure to report suspected abuse extends to other professionals. The court wrote that: "The ... reporting statutes ... evidence a determination by the Legislature that in the event a physician does diagnose a battered child syndrome, due care includes a duty to report that fact to the authorities. ... The same is true of each of the persons and entities covered by this legislation." 551 P. 2d at 394 n.8. The court goes on to remark that "school officials and teachers" have the same duty to report as that imposed on physicians. *Id.* at 395 n.5. *See also* Note, *Civil Liability for Teachers, supra* note 16. The non-legal literature contains relatively little about the duty of educators to report child abuse. Several articles which may be of interest to educators are: Beezer, *Reporting Child Abuse and Neglect: Your Responsibility and Your Protections*, 6 Phi Delta Kappan 434 (Feb. 1985); Roscoe, *The Educator's Role in Identification and Interaction with Abuse Victims*, 105(1) Education 82 (Fall 1984); Levin, *Teachers' Perceptions, Attitudes, and Reporting of Child Abuse/Neglect*, 62(1) Child Welfare 14 (Feb. 1983).

25. W. Keeton, Prosser and Keeton on Torts (1984).

26. *Id.* at 164-65.

27. *Id.* at 383.

plaintiff's injuries.[28] A teacher or school district being sued by a student could argue that the injuries inflicted by the parents were the work of third party tortfeasors, and that a defendant is not responsible for the illegal acts of such persons. This argument would probably fail, however, because the clear majority of courts hold that the forseeable intervening acts of third parties do "not amount to a 'superseding cause' relieving the negligent defendant of liability."[29] Thus, it appears that under the rationale articulated in *Landeros v. Flood*, school personnel can be held liable for negligent failure to detect and report child abuse.

Perhaps the clearest case for liability for failure to report grows out of the tort doctrine which holds that the standard of care to which individuals must conform may be established by a statute which requires certain behavior. In *Prosser and Keeton on Torts*, the doctrine of liability based on violation of statute is described as follows:

> The standard of conduct required of a reasonable person may be prescribed by legislative enactment. When a statute provides that under certain circumstances particular acts shall or shall not be done, it may be interpreted as fixing a standard for all members of the community, from which it is negligence to deviate.... The fact that such legislation is usually penal in character, and carries with it a criminal penalty, will not prevent its use in imposing civil liability, and may even be a prerequisite thereto.
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> ....
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> Once the statute is determined to be applicable—which is to say, once it is interpreted as designed to protect the class of persons, in which the plaintiff is included, against the risk of the type of harm which has in fact occurred as a result of its violation—and once its breach has been established, probably a majority of the courts hold that the issue of negligence is thereupon conclusively determined....[30]

Failure to detect and report suspected child abuse fits within the formula for liability based on violation of statute. In fact, it would be difficult to imagine a case more appropriately suited to application of the doctrine. First, the reporting statutes are quite clear about what must be done and under what circumstances. Strong policy arguments, based on principles of child protection, can be mounted to persuade courts that the statutes establish the standard of care, and that failure to report is negligence. Second, the overriding purpose of the statutes is to prevent abuse, therefore, children are within the class of persons protected by the laws. Third, when failure to report abuse leads to further injury, the "requirement that the harm suffered must be of the kind which the statute was intended, in general, to prevent" is satisfied. Finally, failure to report constitutes a clear breach of the mandatory reporting require-

28. *See id.* at 272-80.

29. Landeros v. Flood, 551 P.2d at 395. *See* Restatement (Second) of Torts § 440; W. Keeton, Prosser and Keeton on Torts 303 (1984).

30. W. Keeton, *supra* note 25 at 220, 229-30.

ment. Thus, the potential for civil liability is present whenever educators fail to detect or report abuse.

In sum, the potential exposure to civil liability for failure to detect or report suspected child abuse is considerable. The time is ripe for in-service training designed to improve the ability of educators to detect abuse and neglect and to raise the level of knowledge about the reporting laws. The need for such training is substantiated by the results of research on the level of teacher knowledge about child abuse and the reporting requirement. In an article titled *Teachers' Perceptions, Attitudes, and Reporting of Child Abuse/Neglect*,[31] Patricia G. Levin offers the following revealing observations:

> Recent literature indicates that school personnel generally seriously underreport and often mishandle suspected child abuse and neglect because of failure to recognize the signs of abuse and failure to report suspected abuse to proper authorities. Lynch... estimated that reports covered only 1–10% of the actual occurrences. Others estimate that only one of 20 cases gets reported....
>
> Why do educators fail to report child abuse and neglect? The research completed to date shows that schools are on the whole not prepared to deal adequately with the child abuse problem. Collucci ... indicates that less than 5% of the nation's schools have working policies and procedures for reporting child abuse and neglect. Manley-Casimar and Newman... showed that many teachers do not know the symptoms of child abuse. Furthermore, those who suspect child abuse often do not want to get involved for fear of meddling with parents' right to discipline their children as they see fit.
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> ....
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> [T]eachers [responding to a questionnaire] indicated relatively low levels of knowledge of child abuse symptoms and many teachers found the programs to teach personnel about child abuse to be inadequate.

It is clear from the research reported above that school administrators and their attorneys should take action to improve the education system's response to abuse and neglect. The beneficiaries of such training will be the schools, their students, and the community.

Before leaving the subject of liability premised on failure to report, it is important to dwell for a moment on the question of whether cases addressing the issue of educational malpractice are relevant to the liability discussed in this subsection. The handful of appellate decisions discussing the concept of educational malpractice refuse to recognize such a cause of action.[32] The courts reason that it would be difficult or

31. Levin, *Teachers' Perceptions, Attitudes, and Reporting of Child Abuse/ Neglect*, 62(1) Child Welfare 14, 15,19 (Feb. 1983).

32. *See, e.g.*, Peter W. v. San Francisco Unified School Dist., 131 Cal. Rptr. 854 (Cal. Ct. App. 1976). *See also*, W. Keeton, Prosser and Keeton on Torts 1048-49 (1984), where the author observes that "'the 'educational malpractice' claims, based on a school's failure to teach, test or counsel a pupil adequately, with resulting emotional or intellectual harm, have been denied for reasons sometimes similar to those involved in the discretionary immunity." E. Reutter, The Law of Public Education 165-66 (3d ed. 1985).

impossible to define the legal duty which is an element of a malpractice cause of action. Additionally, they state that recognition of educational malpractice would be against sound public policy.

Could an educator or school district successfully argue that the educational malpractice cases govern litigation on the question of failure to report child abuse, thus ruling out liability? Probably not. In the child abuse reporting area the clear public policy is to support maximum reporting and to penalize those who violate the reporting duty. This important public policy will be furthered by imposing civil liability on those who fail to detect and report abuse. Furthermore, the duty issue which causes so much difficulty in the malpractice context does not pose a substantial problem when it comes to reporting. The duty to report is straightforward and clearly defined. A significant body of case law already holds schools to a duty to protect the physical safety of students, and these cases can be employed to bolster the argument for liability. Finally, imposition of liability will not interfere with the smooth functioning of the schools or with the planning and implementation of academic programs. For the foregoing reasons, it is reasonably safe to conclude that the educational malpractice cases will not provide succor to defendants enmeshed reporting litigation.

Criminal Liability for Failure to Report

Most child abuse reporting statutes state that willful failure to report child abuse is a misdemeanor. The authors were unable to locate any appellate decisions dealing with criminal action against educators for failure to report. As prosecutors step up their efforts against child maltreatment, additional prosecutions can be expected.

A story carried in the *Los Angeles Times* on July 13, 1984 describes the prosecution of a teacher.[33] The story is worth repeating to make the point that criminal action is a possibility that must not be ignored:

> A criminal complaint has been issued against a Claremont elementary school teacher accused of failing to inform police about the case of an 8-year-old girl who told of being fondled on school grounds by a 12-year-old boy.
>
> [Defendant], 40, a third-grade teacher at Sycamore Elementary School, faces a misdemeanor charge under a little-used law for failing to report an occurrence of child abuse or sexual assault to authorities.
>
> The complaint was filed last Friday by the district attorney's office in Pomona Municipal Court. [Defendant], who has been on vacation, was expected to turn herself in today.
>
> ....
>
> The alleged act of sexual intercourse was said to have occurred in May or June.
>
> [T]he girl had told [Defendant] earlier this year, but some time before the alleged intercourse, that she had been fondled. The teacher told the girl to discuss the fondling encounters with her mother....

33. Los Angeles Times, July 13, 1984 at § II, 8, col. 3.

> According to police reports..., the teacher also consulted the school psychologist after the girl's disclosure for advice about how to deal with the problem.
>
> [Defendant] reportedly told police that she did not inform law enforcement authorities because of the "confidentiality" that she believed existed between herself and the pupil.
>
> The psychologist... told police that she advised [Defendant] to keep the confidence because the incidents appeared to be nothing more than "kids playing."

The case from Sycamore Elementary is a tragic example of the mistakes made every day by well-intentioned but uninformed educators. One can only imagine the anguish experienced by a dedicated teacher who is arrested on criminal charges and forced to endure the cruel gauntlet of the criminal justice system. Surely this case is convincing evidence of the pressing need for in-service training on the recognition and assessment of child abuse and the duty to report.

Other Potential Liability

Child abuse reporting statutes establish procedures which permit professionals such as police officers, physicians, and social workers to take children into emergency protective custody. Such action is sometimes necessary to protect a child during the time needed to secure a protective order from the juvenile court. The reporting statutes do not extend this emergency authority to educators, and this fact raises a question about the proper course of action when a child would be in immediate danger if returned to a parent or other adult. Retaining custody of the child could lead to liability for false imprisonment, therefore, the most attractive alternative is usually emergency law enforcement assistance.

School districts and school board members could find themselves subject to liability for failure to provide in-service training on the recognition and assessment of child abuse and neglect and on the statutory duty to report suspected maltreatment to appropriate authorities.

Liability for failure to report suspected child abuse is a realistic possibility, but legal exposure for nonfeasance is not the only danger. Educators and their counsel must also prepare to meet allegations of unwarranted reporting when action *is* taken pursuant to the reporting statutes. The case of *Roman v. Appleby*[34] is a good example of the dangers lurking in good-faith efforts to comply with the reporting laws. The defendant in this federal court action was a high school guidance counselor. The counselor conducted several interviews with a student and determined that the young man had serious psychological problems. After the parents declined to provide a psychiatric evaluation for the boy, the counselor reported the matter to child protective services. Social workers investigated the case and filed a petition in juvenile court

34. 558 F. Supp. 449 (E.D. Pa. 1983).

seeking authorization to provide psychiatric care for the child. In response, the parents filed an action under 42 U.S.C. section 1983 seeking relief for alleged violations of the first amendment free exercise clause, the constitutional right to family privacy, fourteenth amendment due process, and the equal protection clause.[35] They also sought recovery for pendent state claims based on negligence, intentional infliction of emotional distress, and invasion of privacy.

The district court granted defendant's motion for summary judgment, holding that the counselor was protected from liability by good faith immunity and by the statutory immunity granted individuals reporting suspected child abuse. While the outcome of the *Roman* case was favorable for the counselor, the decision illustrates the importance of training school employees in how to evaluate suspected abuse so that inappropriate reporting is avoided. As is true with most activities carrying a risk of litigation, liability can follow too much as well as too little action.

Defenses

When the spectre of litigation arises from either a failure to report child abuse or an allegation of unwarranted reporting, school districts, administrators, and teachers can avail themselves of a panoply of defenses. In addition to the routine tort defenses, educators can rely on several types of qualified immunity. This section contains a cursory disscussion of the immunities.[36]

As entities of government, some school districts may be protected by governmental immunity. Most jurisdictions have abolished such immunity in the tort context, however, and the defense is usually not available. Furthermore, courts have shown solicitous concern for children injured through the negligence of state or other public employees, and the doctrine of governmental immunity has seldom barred recovery.[37]

Public officers are sometimes "immune from liability for acts within the scope of [their] official duties."[38] Immunity is absolute or qualified depending on the official involved and the circumstances of the case. Except in unusual situations, educators enjoy only qualified immunity. Most jurisdictions extend immunity for discretionary acts, but not for acts which are ministerial.[39] Needless to say, drawing the line between

35. For an excellent treatment of 42 U.S.C. § 1983, *see generally* S. Nahmod, Civil Rights and Civil Liberties Litigation (1979).

36. For in-depth discussion of immunity, *see* W. Keeton, Prosser and Keeton on Torts 1032-69 (1984); S. Nahmod, Civil Rights and Civil Liberties Litigation, chs. 7 & 8 (1979); E. Reutter, The Law of Public Education, ch. 7 (3d ed. 1985).

37. *See* W. Keeton, Prosser and Keeton on Torts 1048 (1984), where the author states that "[c]hildren in the state's custody have also engendered judicial concern. . . . School ground injuries resulting from negligently maintained or supervised premises or similar causes usually involve no issue of discretion at all and again, where sovereign immunity is abolished, liability is imposed or denied under general negligence principles."

38. *Id.* at 1056.

39. For in-depth discussion of immunity, see authorities cited in footnote 36.

discretionary and ministerial acts is no easy task, and cases turn on their unique facts. While it is not possible to assert with certainty how a court would view failure to report child abuse, it is suggested that judges would probably come down on the ministerial side of the line. This position finds support in a body of cases denying immunity for conduct such as negligent medical treatment, false imprisonment, injury to people in official custody, and other tortious behavior.[40] When these cases are considered in light of the fact that the reporting statutes remove discretion from those required to report, the case against immunity becomes convincing. In the absence of a statute granting protection from suit, educators are probably not entitled to common law immunity when sued for failure to report.[41]

Plaintiffs frequently seek to commence litigation in the federal forum by alleging constitutional or federal statutory violations by state officials or employees. This is, of course, the ubiquitous 1983 action.[42] The United States Supreme Court "has read the common law immunities, or something very close to them, into the civil rights statutes. Thus... state officers enjoy...[a] qualified immunity" for the performance of discretionary functions.[43] As was true with state immunity, however, a federal court could well decide that immunity does not extend to failure to report suspected abuse.

In addition to common law qualified immunity, the reporting statutes themselves extend broad immunity to individuals who report suspected abuse.[44] One commentator describes this statutory immunity as follows:

> To encourage reporting and other supportive intervention, all states protect mandatory and permissive reporters from potential civil or criminal liability. The immunity usually protects from legal attack all acts required or permitted within the statute, including reporting, taking pictures or x-rays, participating in a judicial hearing on the alleged abuse or neglect, and placing in or assuming temporary protec-

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40. *See* W. Keeton, Prosser and Keeton on Torts 1062 (1984).

41. *But see*, Roman v. Appleby, 558 F. Supp. 449 (E.D. Pa. 1983), where the court dismissed a suit against a school counselor on the ground that, inter alia, she was entitled to qualified immunity for her decision to report suspected psychological neglect to child protection authorities.

42. 42 U.S.C. § 1983 states: "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." For in-depth discussion of section 1983, *see generally* C. Antieau, Federal Civil Rights Acts (1980); S. Nahmod, Civil Rights and Civil Liberties Litigation (1979).

43. W. Keeton, Prosser and Keeton on Torts 1061 (1984).

44. The reporting statutes provide statutory immunity from civil and criminal liability to persons who report suspected child abuse. To be entitled to immunity, the reporter must have acted in good faith. A number of reporting statutes presume good faith, *See, e.g.*, Florida, Illinois, Maine and North Carolina.

tive custody. Immunity is granted only to those persons acting in good faith. In some states, however, good faith is presumed; anyone suing a reporter therefore has the burden of proving that the reporter acted in bad faith. Because fear of legal action is frequently a reason for not reporting, any education program must clearly explain the immunity provision to all potential reporters.[45]

School officials and teachers who find themselves named as defendants in litigation growing out of the reporting statutes can take comfort that as long as they acted reasonably and in good faith, the law will probably shield them from liability.

The Critical Role of Educators in the Preservation of Evidence of Child Abuse

Physical, psychological, and sexual abuse of children is usually committed in the privacy of the home, and perpetrators go to great lengths to keep their activities secret. Children are threatened with dire consequences if the truth comes out, and many youngsters are consequently intimidated into silence.[46] Teachers, school nurses, counselors, and educational psychologists are frequently in a good position to detect abuse that a child is afraid to disclose. Moreover, the special relationship that often exists between student and educator may enable a child to confide the secret to a trusted teacher when the child would not tell anyone else.

Educators sometimes become aware that a child is abused through observation of the child's body, clothing, or demeanor.[47] As a police officer or lawyer would put it, the educator learns of abuse through *physical evidence*. Alternatively, abuse may be revealed by statements made by the child — *verbal evidence* of wrongdoing. For the reasons developed below, it is vitally important that educators be taught rudimentary steps they can take to preserve physical evidence and increase the probability that a child's verbal statements will be admissible in legal proceedings.

Hearsay Evidence

Abuse frequently comes to light when children respond to questioning from adults who suspect that something is wrong. On other occasions, victims spontaneously reveal what happened. When such statements are offered as substantive evidence of child abuse, they are hearsay, and

45. *Note, State Child Abuse Statutes*, *supra* note 13, at 262-63.

46. Child abuse — especially sexual abuse — is seriously underreported. One study of sexual abuse revealed that only two percent of intrafamily and six percent of extrafamily sexual abuse was reported to authorities. Russell, *The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children*, 7 Child Abuse and Neglect 133, 137 (1983).

47. The Battered Child (C. Kempe & R. Helfer eds. 3d ed. 1980) (how to recognize abused and neglected children).

under the hearsay rule they must be excluded unless they fall within an exception to the rule.[48] Child abuse is often very difficult to prove,[49] and a child victim's hearsay statements frequently constitute the most important evidence of wrongdoing.[50]

This subsection contains a brief overview of the hearsay exceptions most frequently utilized in child abuse litigation. Following this discussion, we cull from the case law a list of factors which educators should watch for and document in order to increase the likelihood that a court will find a child's statements to be within an exception.

Courts utilize several exceptions to the hearsay rule to approve admission of statements by children. The most frequently employed is the so-called excited utterance exception, which permits admission of statements "describing or explaining an event or condition made while the declarant was under the stress of excitement caused by the event."[51] The reporters contain many child abuse decisions relying on this exception,[52] and the case of *State v. Boodry*[53] is a good example of proper application of the exception. In *Boodry*, the Arizona Supreme Court approved the admission of statements by a 5-year-old victim of sexual abuse. When a neighbor heard the child "crying and hollering 'Daddy, oh, Daddy,' as if she were being whipped,"[54] the neighbor broke into the house where she discovered the child's father in the act of sexually molesting the girl. The neighbor grabbed her and "ran out of the house carrying the child. She testified that the child was crying and very frightened and the child immediately began telling her what happened. The victim said that her father had had intercourse with her and repeated the words he had used during the occurrence."[55] It would be difficult to imagine a more appropriate case for application of the excited utterance exception. The child was injured, in pain, and afraid, the startling event occured moments before her declarations, her statements were directly related to the abuse, and finally, the child spoke spontaneously rather than in response to questioning.

In *Boodry* the excited statements were uttered immediately following the startling event. It is not necessary, however, that a child's statements be made straightway. Courts use the excited utterance exception

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48. The Federal Rules of Evidence define hearsay as follows: "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c).

49. *See generally*, Myers, *The Legal Response to Child Abuse: In the Best Interest of Children?*, 24 J. Family L. (1986) [hereinafter cited as Myers], and authorities cited therein.

50. For an excellent article on the issues raised by use of hearsay evidence in child abuse litigation, *see* Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 Columbia L. Rev. 1745 (1983) [hereinafter cited as Note, *Comprehensive Approach*].

51. Fed. R. Evid. 803(2).

52. *See* cases collected in Note, *Comprehensive Approach*, *supra* note 50.

53. 394 P. 2d 196 (Ariz. 1963), *cert. denied*, 379 U.S. 949 (1964).

54. *Id.* at 197.

55. *Id.* at 197-98.

to admit declarations made minutes and even hours after the event.[56] Furthermore, some courts hold that statements are within the exception if spoken at the first safe opportunity, such as when a child is reunited with his or her mother.[57] The most important factor is that the child remain upset or disturbed by the abuse.

In addition to the excited utterance exception, courts occasionally rely on other exceptions to the hearsay rule, including the exceptions for present sense impressions,[58] statements to medical personnel for purposes of diagnosis and treatment,[59] and, where it applies, the so-called residual exception.[60]

In 1982 Washington enacted a child victim hearsay exception which authorizes admission of statements which do not fit within other exceptions.[61] In effect, the Washington exception permits admission of all reliable hearsay statements by a child which relate to abuse – a broad brush approach necessitated by the difficulty encountered in proving child abuse. At least six other states have followed Washington's lead, and others may be expected to join the growing trend in favor of admitting child victim hearsay.[62]

A careful reading of the child hearsay cases leaves the clear impression that courts evaluate the totality of the circumstances to determine whether a child's out of court statements bear sufficient indicia of reliability to merit admission under an exception to the hearsay rule. The following factors emerge again and again as the most important:

1. Length of time elapsed between the abuse and the child's statements,[63]
2. Whether the statement was made in response to questioning from an adult, and if so, whether the questioning was leading or non-directive,[64]

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56. *See, e.g.*, Haggins v. Warden, 715 F. 2d 1050 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 980 (1984) (delay of one to one and a half hours between event and declaration did not defeat spontaneity); United States v. Iron Shell, 633 F. 2d 77 (8th Cir. 1980) (two hour delay did not destroy spontaneity).

57. *See, e.g.*, United States v. Nick, 604 F. 2d 1199 (9th Cir. 1979).

58. *See* State v. Hieb, 693 P. 2d. 145 (Wash. Ct. App. 1984). There are very few reported decisions in which child victim hearsay is admitted under this exception to the hearsay rule. For discussion *see* Myers, *supra* note 49.

59. *See, e.g.*, United States v. Iron Shell, 633 F.2d 77, 83-85 (8th Cir. 1980); Goldade v. State, 674 P. 2d 721 (Wyo. 19830, *cert. denied*, 104 S. Ct. 3539 (1984). *See also* authorities collected in Myers, *supra* note 49.

60. *See, e.g.*, United States v. Nick, 604 F. 2d 1199, 1203-04 (9th Cir. 1979); M.N.D. v. B.M.D., 356 N.W. 2d 813, 818-19 (Minn. Ct. App. 1984); State v. McCafferty, 356 N.W. 2d 159 (S.D. 1984); Myers, *supra* note 49.

61. Wash. Rev. Code Ann. § 9A.44.120 (Supp. 1984). *See* Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legal Innovations*, 98 Harv. L. Rev. 806 (1985); Myers, *supra* note 49.

62. The states are Colorado, Indiana, Kansas, Minnesota, South Dakota, and Utah.

63. *See, e.g.*, Haggins v. Warden, 715 F. 2d 1050, 1057 (6th Cir.), *cert. denied*, 104 S. Ct. 980 (1984); United States v. Iron Shell, 633 F. 2d. 77, 85 (8th Cir. 1980); State v. Rivera, 678 P. 2d 1373, 1375 (Ariz. 1984).

64. *See, e.g.*, United States v. Iron Shell, 633 F. 2d 77, 85 (8th Cir. 1980); W.C.L. v. People, 685 P. 2d 176, 180 (Colo. 1984).

3. Whether the statement is accompanied by signs of excitement or distress,[65]
4. The physical and emotional condition of the child,[66]
5. The child's age,[67]
6. Whether the statement was a product of reflective thought or spontaneous reaction,[68]
7. The characteristics of the event and the subject matter of the statements,[69]
8. Whether the statement was made at the first safe opportunity,[70] and
9. The child's incentive to lie.[71]

When a child spontaneously reveals abuse, or when educators question a child to follow up their suspicions about his or her well-being, they should do so with the foregoing factors clearly in mind. Contemporaneous written notes should be taken and carefully maintained. The notes should document *exactly* what is said, when, where, to whom, and under what circumstances.[72] If the child is excited or upset, this should be carefully noted. It is good practice to have two responsible adults present when questioning occurs.

When questioning is necessary, it is very important that it be nondirective rather than leading. Courts hold that the spontaneity needed for admission under the excited utterance and other exceptions is not destroyed by questioning as long as the questions do not suggest the answers.[73] For example, it would be acceptable for the educator to ask questions like: "What happened?" "Tell me about it." "Is there more?"

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65. *See, e.g.*, W.C.L. v. People, 685 P. 2d 176, 180 (Colo. 1984).

66. *See, e.g.*, Haggins v. Warden, 715 F. 2d 1050, 1058 (6th Cir.), *cert. denied*, 104 S. Ct. 980 (1984); State v. Rivera, 678 P. 2d 1373, 1375 (Ariz. 1984).

67. *See, e.g.*, Haggins v. Warden, 715 F. 2d 1050, 1058 (6th Cir.), *cert. denied*, 104 S. Ct. 980 (1984).

68. *Id.*

69. *See, e.g.*, United States v. Iron Shell, 633 F. 2d 77, 86 (8th Cir. 1980).

70. *See, e.g.*, State v. Messamore, 639 P. 2d 413, 418 (Hawaii 1982).

71. Children are unquestionably able to lie. The child's developmental age will influence his or her ability to stretch the truth. Numerous authorities believe that young children do not usually lie about abuse, especially sexual abuse. For discussion regarding whether children tell the truth about their abuse *see* Myers, *supra* note 49.

72. An interesting and difficult question arises regarding whether notes of a child's statements become part of the child's education record under the Family Educational and Privacy Rights Act, 20 U.S.C. § 1232g; 34 C.F.R. § 99 (Buckley Amendment). If the notes are a part of the child's record, parents may have a right to inspect the notes. 34 C.F.R. § 99.11. If the notes become part of the record, the question arises as to whether school officials can disclose the notes to prosecutorial, law enforcement, or child protective services officials. Section 99.35 of the Buckley Amendment regulations set forth several circumstances under which education records can be disclosed without parental consent. It does not appear that an exception exists for giving the contemplated notes to proper authorities, unless those authorities (1) secure a court order or a subpoena (34 C.F.R. § 99.31 (a)(9)), or (2) unless it can be argued that the exception for disclosure of records because of a "health or safety emergency" applies. *Id.* § 99.31 (a)(10).

73. *See, e.g.*, United States v. Iron Shell, 633 F. 2d 77, 85 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981); Alston v. United States, 462 A. 2d 1122 (D.C. 1983).

Leading questioning like the following could defeat admissibility: "Did your daddy hit you with a belt or with a stick?" "Your mommy made you cry didn't she?" "Did your brother put his pepe in your mouth?" The importance of non-leading questioning cannot be overemphasized. A statement which fits within a hearsay exception and which may be the only solid evidence of abuse will be excluded if elicited through improper questioning.

Educators are in daily contact with children, some of whom are abused. When a child describes his or her abuse, the educator is in an excellent position to take steps to increase the likelihood that legal action can be taken to protect the child. At the same time, however, the manner in which an educator responds to a child's cry for help can quickly undermine or destroy the state's ability to intervene. With this stark reality in mind, administrators and their counsel are well advised to provide the in-service training needed to equip teachers and ancillary personnel with the knowledge required to respond appropriately.

Physical Evidence

Educators may become aware of abuse through their observation of the child. The signs may be as obvious as bruises in unusual locations, cuts, or a limp, or as subtle as discomfort when sitting, inappropriate clothing designed to hide the evidence of abuse, or slowly progressive malnutrition. Whatever the signs that raise the educator's suspicion, careful and detailed written notes should be made as soon as possible. Since the physical evidence of abuse or neglect may well be gone before litigation is commenced, let alone completed, the educator's documentary notes may be the best evidence of the child's condition when abuse was detected.

Preservation of physical evidence through laboratory testing, physical examination, x-rays, and photographs is the work of police officers, physicians, and child protection workers. Most child abuse reporting statutes make specific provision for such matters. In order to facilitate the gathering and preservation of such valuable evidence, educators should respond to suspected abuse promptly so that appropriate officials can step in and take necessary action.

Conclusion

The phenomenon of child abuse and neglect cannot be ignored. The physical and mental well-being of too many children is at stake to permit ourselves to become complacent. Educators and their attorneys are in a position to take affirmative steps to ensure that children who are the unfortunate victims of violence or neglect are protected. The time is at hand to take those steps.